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No. 91-1470

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOE E. FRYAR,

Petitioner,

versus

EDWARD C. ABELL, JR. AND CAREY WALTON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PURCHASERS OF WESTSIDE HABILITATION CENTER REVENUE BONDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF EDWARD C. ABELL, JR. AND CAREY WALTON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PURCHASERS OF WESTSIDE HABILITATION CENTER REVENUE BONDS OPPOSING JOE E. FRYAR'S PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

1. Introduction.

Petitioner Joe E. Fryar ("Fryar") seeks review of a decision of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") affirming a judgment entered by the district court reinstating a jury verdict rendered after a nine-week trial in favor of the plaintiff class. The verdict found Fryar and All American Services Company, Limited ("AA"), a Bermuda corporation organized and controlled by Fryar, liable for violations of RICO. Fryar attacks the Court of Appeals' decision, asserting that (1) the RICO statute is unconstitutionally vague; (2) the district court's reconsideration of the jury's RICO verdict in light of the decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989) pursuant to this Court's mandate violated Fryar's due process rights by retroactively applying a substantive change in the law; (3) and the remand and reconsideration by the district court somehow constitutes an infringement of Fryar's right to trial by jury under the Seventh Amendment. Fryar's petition is meritless, failing to present any basis for review of the decision below on writ of certiorari. First, Fryar's constitutional challenge to the RICO statute which was first asserted six years after commencement of the case, four years after a nine-week jury trial resulting in a jury verdict in favor of plaintiff, and two and one-half years after the Court of Appeals affirmed the jury verdict is untimely and should not be considered. Fryar's two other constitutional challenges raised for the first time in the Court of Appeals on petition for rehearing also are untimely and should not be considered. Second, as found by the Court of Appeals,

Fryar's facial attack on the constitutionality of RICO is simply too superficial to accept. Fryar has not and cannot establish that the statute failed to give fair notice that *his conduct* was forbidden as required to support a vagueness challenge outside the First Amendment context. Third, the consideration of the *H.J.* decision which did not constitute a substantive expansion of the law, did not violate Fryar's due process rights. Moreover, if *H.J.* did effect a substantive change in the law which should not be applied retroactively, the prior law as stated in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) should apply. Accordingly, the original Court of Appeals' decision affirming the jury's RICO verdict under *R.A.G.S.* is correct and should not be reviewed. Finally, reconsideration of the jury verdict in light of *H.J.* by the district court rather than a new jury did not violate Fryar's right to trial by jury. Fryar who opposed the remand to the district court and who failed to request in the courts below a trial by jury of the reconsideration issue waived his right, if any, to trial by jury. Further, a party does not have a constitutional right to trial by jury of the reconsideration of a prior jury verdict.

2. Background.

Beginning in 1976 and continuing through the trial in 1987, Fryar and AA conducted a scheme to defraud bondholders and enrich themselves. In essence, Fryar formed an allegedly non-profit corporation, Westside Habilitation Center, Inc. ("Westside") to own and operate a home for the mentally retarded in Cheneyville, Louisiana. Fryar, with the assistance of AA and others, caused Westside to issue bonds in the amount of $13,550,000 to the

public and used the proceeds to finance the acquisition and construction of the facility at grossly inflated prices for his own enrichment. Fryar, thereafter, reaped substantial profits during his operation of the facility by, among other things, submitting false reimbursement claims to the State of Louisiana Medicaid program and refusing to pay the bondholders interest due. Fryar concealed the fraud by interposing AA in the chain of title to the property purchased by Westside and by failing to disclose to Westside's accountant the true state of affairs. Fryar's and/or AA's concealment of the deceit continued throughout this litigation by concealing documents, fabricating documents, threatening a witness to prevent his appearing to testify, and finally by attempting to bribe the jury at trial.[1]

a. Origin of the Project.

Fryar masterminded the Westside project. First, he obtained certification from the State of Louisiana to build a facility having a projected cost of $1,983,500, despite opposition from officials in the Louisiana Department of Health and Human Resources because of the excessive costs, anticipated substantial profit and questionable need.

Next, Fryar purchased 6.47 acres and a thirty year old vacant school building in Cheneyville, Louisiana

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[1] Fryar subsequently was convicted of attempting to bribe the jury. *U.S. v. Fryar*, No. CR-87-60027-01 (W.D. La. 1988). Fryar's conviction was affirmed by the Court of Appeals. *U.S. v. Fryar*, 867 F.2d 850 (5th Cir. 1989). (A-1).

("Cheneyville Property") from the Rapides Parish School Board for $100,000, its appraised value. Fryar then hired his attorney to incorporate Westside, which had no capital assets. Although a five member board of directors of Westside was appointed, the board never collectively made any decision on behalf of Westside. Rather, Fryar made all decisions, including setting the purchase price for the Cheneyville Property as well as his own fees. As found by the district court, "Fryar fomented and directed the Westside project, and that Fryar, not the board of directors, actually made all important decisions for Westside."

When Fryar was unable to obtain conventional financing for the project, he turned to the possibility of financing through tax-exempt bonds. Fryar enlisted the assistance of Joseph D. Hancock ("Hancock") and his underwriting firm, Hancock, Joseph & Daniels ("HJD") with whom he had previously worked on a similar bond financing for public housing projects in Louisiana. At the time Hancock and HJD were the subject of investigations by the F.B.I., S.E.C. and NASD.

To facilitate the marketing of tax-exempt bonds, Fryar hired Booz, Allen & Hamilton, Inc. ("Booz Allen"), a nationally known consulting firm with extensive experience in evaluating health care facilities in Louisiana, to evaluate the feasibility of the project. Booz Allen concluded that the project was not financially feasible, noting several areas of concern. Despite subsequent consideration of possible solutions, Booz Allen never retracted its concerns regarding the financial structure of Westside. Fryar thereafter threatened Booz Allen with suit because of its adverse conclusions. Booz Allen then agreed to sign

a letter drafted by underwriter's counsel which merely noted that Booz Allen's conclusions may not necessarily still be applicable. The letter did not state that Booz Allen's concerns regarding the financial structure had been ameliorated. Undeterred, Fryar retained a firm with little experience in health care and with no knowledge of the Louisiana Medicaid program from whom he obtained a favorable report.

Fryar continued to encounter other difficulties in effecting his scheme. He initially sought approval from the Louisiana State Bond Commission for the Westside bond issuance. The Commission, however, declined to approve financing for Westside bonds due to, among other things, questions regarding the principals involved, the amount of profit anticipated to inure to the principals, and opposition to the project by officials of the State of Louisiana Department of Health and Human Resources. Still undeterred, Fryar was able to circumvent the Commission by convincing the Town of Cheneyville to approve a bond issuance by Westside in the amount of $12,850,000 pursuant to an obscure and seldom used revenue ruling. Although the town's official records only reflect approval of a bond issuance in the amount of $12,850,000, bonds in the amount of $13,550,000 were issued and the resolution in the closing documents reflects approval of the larger issuance. According to the testimony of the Cheneyville Town Clerk, the resolution was altered.

b. The Property Transaction.

Fryar determined that he would be paid in excess of $5,000,000 to renovate, construct and operate the facility

for an estimated seven months until it became self-sufficient. In addition, Fryar decided to inflate by over $2,300,000 the price to be paid by Westside to purchase the Cheneyville Property he bought for $100,000. Frequently using the mails and wires to communicate messages and transmit documents, Fryar and AA devised a complicated transaction to conceal Fryar's profit and avoid payment by Fryar of taxes on his huge profit. Fryar first sold the Cheneyville Property for $150,000 in late 1981 to AA, his Bermuda corporation. In order to give the transaction a semblance of regularity, the act of sale whereby Fryar sold the property to AA was dated August 21, 1981, notwithstanding that AA had not been organized as of that date. The funds for AA's purchase were obtained from Fryar's underwriting account in a related Bermuda company. AA then resold the Cheneyville Property to Westside for $2,459,700 – $2,000,000 in Westside bonds and the remainder in cash. Retaining its ownership interest in the bonds, AA pledged the bonds to secure Fryar's performance as developer, an obligation undertaken by Fryar pursuant to the development agreement for which he was to be paid $5,000,000. This transaction accomplished several things. First, it concealed from investors the fact that Fryar realized an additional $2,000,000 on the property transaction and would receive substantial tax-free interest payments on the $2,000,000 bonds.[2] The transaction also concealed from investors that Fryar had no money at risk, and, that in fact, the

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[2] As of trial, Fryar and AA had received approximately $900,000 in interest payments on the $2,000,000 bonds.

investors themselves were providing the security for Fryar's performance.

Although Fryar contends that the $2,459,000 was paid to AA for assuming Fryar's obligations under the development agreement, as found by the district court, "[such assertion . . .] is completely belied by the evidence adduced at trial. . . . " The evidence of AA's assumptions of Fryar's obligations for which he was to be paid $5,000,000 was "a *copy* of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial." Fryar also relied on a handwritten letter from AA's President dated November 24, 1981 as proof of AA's assumptions of his obligations. The trial court questioned the authenticity of this letter, stating:

> The evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar, in consideration for receiving $2,459,000 for a piece of property that cost it only $150,000, was a letter from All American which mysteriously appeared during the course of the trial. The letter was dated November, 1981, wherein All American agreed to buy the property which it had already purchased in August, 1981. . . .

In fact, the trial court found that AA was "organized for the express purpose of concealing that a profit in excess of $2,000,000 was to be made on the sale of the Cheneyville Property."

c. The Bond Issuance.

Fryar proceeded to issue the bonds with the assistance of the other defendants. As found by the Court of

Appeals, the bonds were sold using sales circulars erroneously portraying Fryar as having $2,000,000 at risk. *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988).

d. Fryar's Operation of Westside.

Fryar thereafter constructed and operated Westside. During Fryar's operation, he submitted reimbursement claims to the State of Louisiana Medicaid program which misrepresented the true cost of the facility, the obligations of Westside and the fact that the bondholders were not being paid the interest owed. As a result of these misrepresentations, Fryar received payments from the State of Louisiana Medicaid program substantially in excess of what should have been paid. More importantly, Fryar pocketed the money paid as reimbursement on debts to the bondholders, thereby profiting personally by an amount in excess of $1,300,000. *Abell v. Potomac Insurance Co.*, 946 F.2d 1160, 1163, n.4 (5th Cir. 1991). Westside's own accountant admitted on cross-examination that such misrepresentations constituted Medicaid fraud.

e. The Litigation.

Fryar's fraud and deceit continued throughout this litigation. During the pretrial discovery proceedings, Fryar and AA attempted to thwart and obstruct these proceedings. For example, although respondents sought for over two years to obtain all documents from AA pertaining to the transaction at issue by subpoenas and requests for production of documents, on the eve of trial

AA produced previously undisclosed copies of documents purporting to be corporate records of AA, correspondence between AA and Fryar, and correspondence between AA and its counsel. The originals of the "new documents" were not produced, notwithstanding the questionable authenticity of the copies.

Fryar's attempt to circumvent the rules went far beyond his "concealment" of documents. He also interfered with the discovery by threatening a witness to dissuade him from testifying. Prior to trial, respondents sought to take the deposition testimony in Bermuda of AA's officer and auditor, Ian Fleming. Mr. Fleming's testimony was critical because AA had consistently produced as representatives persons with no personal knowledge of the transaction at issue. These persons, in fact, testified that Mr. Fleming was more competent to testify in the matters at issue.

Although Mr. Fleming originally agreed to appear for his deposition, he failed to appear. He then moved through an attorney previously representing AA to quash the subpoena requiring his appearance. Mr. Fleming's change of heart resulted from threats by AA to dissuade him from testifying as established by a telex discovered during trial. (A-15). After a two day evidentiary hearing during trial, the trial court held that although the telex came from Bermuda, its probative value was outweighed by the prejudicial effect.

f. Bribery of the Jury.

Fryar's final attempt to thwart justice occurred during the trial when he attempted to bribe two of the jurors.

A little over a month into the trial, the trial judge received information from the F.B.I. that Fryar was attempting to bribe several members of the jury. The judge questioned the F.B.I. agent *in camera*, outside the presence of the defendants and their attorneys, satisfying itself that probable cause existed to believe that Fryar indeed had attempted to bribe two jurors. Prior to charging the jury, the judge excused two jurors.

Fryar's subsequent conviction of eight counts of obstruction of justice was affirmed by the Court of Appeals.[3] More recently, Fryar was convicted of money laundering.[4]

g. The District Court's Judgment.

Following a nine week trial, a jury returned a verdict for the plaintiffs finding Fryar and AA liable for violations of RICO. The trial court entered judgment on February 19, 1987, awarding damages, *inter alia*, in the amount of $2,550,000 for the RICO violations and attorneys' fees in the amount of $2,567,323.80. The trial court thereafter denied Fryar's post-trial motions in a lengthy opinion which thoroughly reviewed the evidence. The trial court held that "[t]he evidence adduced at trial convinces this Court beyond any doubt that the jury's verdict is reasonable." The court stated:

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[3] *U.S. v. Fryar*, No. CR-87-60027-01) (W.D. La. 1988); *U.S. v. Fryar*, 867 F.2d 850 (5th Cir. 1989). (A-1).

[4] *U.S. v. Fryar*, No. CR-89-160 (E.D. La. 1989). (A-17).

The evidence at trial abundantly supported the jury's finding that Fryar violated Section 1962(a) of the RICO Act. It is clear that Fryar and All American derived in excess of $2 million from the pattern of racketeering activity which resulted from the issuance of the Westside bonds. It is also well established that at least $2.4 million of the racketeering monies was used by Fryar and All American to acquire an interest in Westside by the purchase of Westside bonds, and that at least part of the proceeds of that investment, the interest payments, were paid to Fryar, who was operating Westside.

The evidence adduced at trial also supports the reasonableness of the jury's finding that Fryar and All American violated Section 1962(b) of the RICO Act. Fryar and All American used the racketeering monies to acquire over $2 million of Westside bonds. As a result of the scheme, Fryar controlled and operated Westside, during which time he received all revenues paid by the state of Louisiana to Westside, including revenues paid as reimbursement for the interest owed by Westside to plaintiffs. Nevertheless, Fryar refused to pay this interest to plaintiffs. Moreover, the fact that Westside failed to make demand upon Fryar for return of the revenues further indicates that Fryar controlled Westside.

The evidence also abundantly supports the jury's finding that Fryar and All American violated Section 1962(c) of the RICO Act. The evidence discussed above clearly indicates that Fryar and All American participated in the scheme to issue and to market the Westside bonds, within the meaning of Section 1962(c).

On appeal, the Fifth Circuit affirmed the jury's RICO verdict, finding that "evidence strongly supports the jury's RICO verdict."[5] The court explained:

> . . . The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial structure. He falsely suggested that he had backed the health care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside their money.
>
> Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did. Fryar used the mails to obtain and transmit the application forms for Westside's certificate of need; to help create All American and interpose it in the transaction; and to send the land transaction documents to All American. He also caused others to use the mails to transmit the sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money; and finally, he caused the mails to be used in an attempt to cover up the fraud and deceive bondholders into believing

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[5] The court of appeals reversed the judgment in favor of the class on its securities law and state law fraud claims. The court affirmed the jury verdict finding Fryar liable to Abell and Walton individually for violations of § 10(b) of the Securities & Exchange Act. *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1147 (5th Cir. 1988).

> All American was performing more obligations than it had actually undertaken.
>
> 858 F.2d at 1130.

The Fifth Circuit also affirmed the RICO damage award in favor of the plaintiff class against Fryar, holding that "the jury awarded plaintiffs considerably less than the damages which they proved at trial." 858 F.2d at 1140.

On March 13, 1989, Fryar filed a Petition for Certiorari to the United States Supreme Court, arguing that plaintiffs failed to establish a pattern of racketeering activity because distinct multiple schemes were not established. On July 3, 1989, the United States Supreme Court granted petitions for certiorari in nine cases, including this one, in which the issue of sufficiency of a pattern of racketeering activity was raised. *Fryar v. Abell*, 492 U.S. 914, 109 S. Ct. 3236 (1989). The Court systematically remanded the nine cases for reconsideration in light of the decision in *H.J. Inc. v. Northwestern Bell Telephone Co., Inc.*, 492 U.S. 229, 109 S. Ct. 2893 (1989) pertaining to the appropriate standard for establishing a pattern of racketeering activity under RICO. *Abell v. Potomac Insurance Co.*, 946 F.2d 1160, 1164 (5th Cir. 1991).

On September 12, 1989, the Court of Appeals remanded the matter to the district court for further consideration in light of *H.J.* and Fryar's pending bankruptcy proceeding. *Abell v. Potomac Insurance Co.*, 884 F.2d 196 (5th Cir. 1989).[6] The plaintiffs moved for

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[6] Fryar commenced a proceeding under Chapter 11 of the United States Bankruptcy Code on May 2, 1989. The

(Continued on following page)

reinstatement of the jury's RICO verdict and the award of attorney's fees, and Fryar moved to dismiss plaintiffs' RICO claims, arguing for the first time that the RICO statute was unconstitutionally vague. (A-20).

The district court granted plaintiffs' motion, upholding the jury's RICO verdict in light of *H.J.* The district court stated:

> In consideration of the principles enunciated in *H.J.*, this Court still holds that the finding of RICO violations is abundantly supported by the evidence. . . . *H.J.* defines a "pattern of racketeering activity" to require a showing of *related* racketeering predicates amounting to or posing a threat of *continued* criminal activity.

The district court rejected Fryar's argument that the RICO statute is unconstitutionally vague.

On appeal, the Fifth Circuit again affirmed the jury's RICO verdict, finding that Fryar's conduct "easily surpassed the RICO threshold". The court explained:

> [T]his Court has already affirmed the judgment for plaintiffs' RICO claims against Fryar for the activities in question, noting that the

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proceeding was converted to a Chapter 7 proceeding on July 13, 1990. By order dated January 3, 1990, the court granted plaintiffs' motion for relief from stay, permitting them to pursue these claims. Plaintiffs filed an adversary proceeding, alleging that Fryar's debt to Abell, Walton, and the class is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (B), (a)(4) and (a)(6); 523(c) and Bankruptcy Rule 4007. The bankruptcy court has continued the proceeding, pending resolution of Fryar's appeal.

> "evidence *strongly* supports the jury's RICO verdict." 858 F.2d 1130 (emphasis added). *H.J.* has, if anything, resolved rather than revolutionized the law, and the *Fryar* facts have not changed. . . .
>
> *H.J.*'s relatedness and continuity tests are fact-specific and the facts adduced at trial and piled up high against Fryar – some 500 bondholders were cheated out of millions of dollars in a scheme that spread itself out over more than six years – are damning. We have no need to sharpen our pencils for subtle RICO analysis: Fryar's mail fraud violations and the fact that these violations were, as observed by the district court, strung together by the making-money-at-the-expense-of-bondholders objective realized by Fryar are enough. Fryar's conduct has, therefore, easily surpassed the RICO threshold, and we affirm the district court's RICO judgment against him.
>
> 946 F.2d at 1167-68.

The Court of Appeals expressly rejected Fryar's constitutional challenge to the RICO statute, noting that it was untimely and, more importantly, fatally flawed. The court explained:

> In bringing his constitutional contention to us, Fryar is apparently overlooking the principle that 'outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct.' [Citations omitted.] . . . A myriad of fraudulent acts spanning more than six years and involving more than five hundred victims – based on the evidence adduced at trial, it follows that Fryar's

> *facial* attack on the constitutionality of RICO is simply too superficial to accept.
>
> 946 F.2d at 1167.
> (Emphasis in original).

3. Fryar's Petition for Certiorari.

Fryar now seeks review of the Court of Appeals' decision affirming the reinstatement of the jury verdict finding Fryar liable for violations of RICO. In support of his petition, Fryar asserts three untimely constitutional challenges: (1) the RICO statute is unconstitutionally vague; (2) his due process rights were violated because reconsideration of the jury's verdict in light of *H.J.* somehow constitutes an impermissible application of a substantive change in the law; (3) and his right to a trial by jury was violated by reconsideration of the jury verdict in light of *H.J.* by the district court rather than a jury.

4. Reasons for Denying the Writ.

Fryar has failed to identify any special or important reasons for granting his petition for writ of certiorari. Indeed, no such special or important reasons obtain to this case. No other court of appeals has rendered a decision that conflicts with the decision rendered in the court below. The decision below does not conflict with applicable decisions of this Court. Nor did the decision below decide an important question of federal law which has not been but should be settled by this Court. Indeed, two of the three arguments asserted were not even considered by the Court of Appeals. Hence, this case is inappropriate for review.

More importantly, the Court of Appeals merely found that fraudulent conduct cheating 500 bondholders out of millions of dollars in a scheme that spanned more than six years "easily surpassed the RICO threshold". 946 F.2d at 1168. The decision is correct and should not be reviewed. Further, Fryar's constitutional arguments are untimely and meritless.

5. Fryar's Newly-Raised Constitutional Attacks Cannot be Considered.

Six years after commencement of this case, four years after a nine-week jury trial resulting in a jury verdict in favor of the plaintiffs, and two and one-half years after the Fifth Circuit affirmed the jury's RICO verdict, Fryar asserted for the first time on remand a constitutional attack on the RICO statute. Fryar argued that the RICO statute is unconstitutionally vague requiring dismissal of plaintiffs' RICO claims. Subsequent to the second Court of Appeals' decision, Fryar asserted for the first time on Petition for Rehearing two additional constitutional arguments: (1) retroactive application of *H.J.* violated his due process rights; and (2) reconsideration by the Court rather than a new jury infringed upon his right to trial by jury. Fryar's newly-raised constitutional attacks should not be considered.

It is well established that issues not raised before trial are considered waived and cannot be considered on appeal or remand. *See e.g., Shingleton v. Armor Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980); *Martin Oil Co. v. Gulf Insurance Co.*, 605 F.2d 197, 199 (5th Cir. 1979). In

Glass v. Pfeffer, 849 F.2d 1261 (10th Cir. 1988), the Tenth Circuit has explained:

> [b]y failing to raise a § 1985(2) legal theory before the district court, plaintiffs foreclosed themselves from arguing that theory on appeal *or on remand* . . .
>
> 849 F.2d at 1264.
> (Emphasis supplied).

That the case was remanded with an explicit mandate for reconsideration in light of *H.J.* did not reopen the case for consideration of all issues. As explained by the court below:

> We did not lower a pinata of issues for Fryar to split open, returning to this Court with his arms full.
>
> 946 F.2d at 1165.

The decision below is consistent with other courts of appeals decisions. In *U.S. v. Church*, No. 89-8509, 1992 U.S. App. LEXIS 3931 (11th Cir. 1992), the Eleventh Circuit refused to consider a vagueness challenge to the RICO statute "because appellants failed to raise it in the district court". In *Robinson v. Ariyoshi*, 854 F.2d 1189 (9th Cir. 1988), the Ninth Circuit considered the scope of a remand pursuant to language identical to the language used in remanding this case, and concluded that a remand on one narrow question does not reopen the whole case for reconsideration of all issues, including issues that may have been changed by law in the interim. Rather, upon remand the court may consider only the effect of the Supreme Court's decision and its progeny upon the case before it. *See also Ostrofe v. H.S. Crocker Co.*,

740 F.2d 739, 748 (9th Cir. 1984) (remand required reconsideration in light of *Associated General Contractors* and nothing more); *Minpeco, S.A. v. Hunt*, 724 F. Supp. 259, 260 (S.D.N.Y. 1989) (defendants criticized for first asserting a constitutional challenge to RICO after trial and disposition of post-trial motions).

Ignoring these decisions, Fryar has offered no argument supporting his attempt to have legal issues considered for the first time on remand or on petition for rehearing in the Court of Appeals. Fryar's constitutional attacks are untimely and should not be considered.

6. The RICO Statute is Not Unconstitutionally Vague.

Although the Court of Appeals found Fryar's vagueness argument untimely it, nevertheless, considered and rejected the constitutional attack on the RICO statute. 946 F.2d at 1165-67. The court reasoned that "outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct". 946 F.2d at 1167. That is, "Fryar would have had to show . . . that the scope of RICO's 'pattern' element was so unclear that a person of ordinary intelligence in Fryar's position would not have had adequate notice that his actions constituted 'a pattern of racketeering activity.' " *Id.* Considering the evidence adduced at trial – "[a] myriad of fraudulent acts spanning more than six years and involving more than five hundred victims" – the court concluded that "Fryar's *facial* attack on the constitutionality of RICO is simply too superficial to accept". *Id.* (Emphasis in original).

The Court of Appeals' decision is consistent with the decisions of the majority of courts which have considered the vagueness argument urged here by Fryar. Since *H.J.*, seven circuits, including the court below, have rejected the argument. In *U.S. v. Van Dorn*, 925 F.2d 1331, 1334 n.2 (11th Cir. 1991) the Eleventh Circuit found defendants' vagueness argument to be "completely lacking in merit." In *U.S. v. Glecier*, 923 F.2d 496, 497-98 n.1 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 54 (1991), the Seventh Circuit rejected a vagueness challenge, noting that "[w]e . . . join the First and Third Circuits in reaffirming that the RICO statute is not unconstitutional despite Justice Scalia's statements concerning the pattern requirement in his concurrence in *H.J.* . . . " In *U.S. v. Tripp*, 782 F.2d 38, 41-42 (6th Cir.), *cert. denied*, 475 U.S. 1128, 106 S. Ct. 1656 (1986), the Sixth Circuit squarely rejected the vagueness argument. In *U.S. v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2826 (1991), the Second Circuit reiterated that RICO was not unconstitutionally vague. In *U.S. v. Pungitore*, 910 F.2d 1084, 1102-05 (3rd Cir. 1990), *cert. denied sub nom, Scarfo v. U.S.* ___ U.S. ___, 111 S. Ct. 2009, 111 S. Ct. 2010, 111 S. Ct. 2011 (1991), the Third Circuit rejected a vagueness challenge. In *U.S. v. Angiulo*, 897 F.2d 1169, 1179-80 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 130 (1990), the First Circuit rejected a vagueness argument. A flood of district court cases likewise have rejected vagueness attacks. *See e.g., U.S. v. Marchese*, No. 89 Cr. 229, 1991 U.S. Dist. LEXIS 4767 (S.D.N.Y. 1991) (rejecting argument that RICO statute is unconstitutionally vague); *Chase Manhattan Bank v. Malatesta*, No. 86 Civ. 1808, 1990 U.S. Dist. LEXIS 9222 (S.D.N.Y. 1990) (rejecting vagueness argument in light of

Supreme Court's recent interpretation of "pattern" and fair warning provided by statutes listed under § 1961(1)); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F. Supp. 869 (N.D. Ill. 1990) (finding RICO's pattern requirement constitutional); *In Re Crazy Eddie Securities Litigation*, 747 F. Supp. 850 (E.D.N.Y. 1990) (finding the statute constitutional); *In Re Par Pharmaceutical, Inc. Securities Litigation*, 733 F. Supp. 668, 683 n.15 (S.D.N.Y. 1990) (declining to strike down RICO statute).

Fryar has not cited one decision holding to the contrary. Instead, ignoring the numerous decisions squarely rejecting the vagueness argument in a RICO case, Fryar relies heavily on Justice Scalia's dictum in his *H.J.* concurrence and argues that the statute is void on its face. Fryar's reliance is misplaced. Justice Scalia's language seized upon by Fryar does not hold that the RICO statute is unconstitutionally vague. Indeed, Justice Scalia acknowledged that "[n]o constitutional challenge to this law has been raised in the present case, and so that issue is not before us." 109 S. Ct. at 2909. Justice Scalia's comments merely are dictum.

More importantly, Fryar's facial challenge to the RICO statute ignores the well-established principle recognized by the Court of Appeals that outside the First Amendment context, a facial challenge to a statute will not lie.[7] Rather, the vagueness challenge must be limited

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[7] Fryar also argues without authority that in a civil action suit the RICO statute must be considered a criminal statute. To the contrary, courts, including this one, have held that RICO is not to be judged by criminal standards. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240, 107 S. Ct. 2332, 2344

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to whether the statute is vague as applied to the defendant's conduct. *U.S. v. Pungitore*, 910 F.2d 1084, 1104 (3rd Cir. 1990), *cert. denied sub nom Scarfo v. U.S.*, ___ U.S. ___, 111 S. Ct. 2009, 111 S. Ct. 2010, 111 S. Ct. 2011 (1991) ("outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct"); *U.S. v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 130 (1990) (in absence of First Amendment considerations, vagueness challenge must be examined in light of a case's particular facts); *see also U.S. v. National On Lelong Chinese Merchants Ass'n*, No. 90 CR 760, 1991 U.S. Dist. LEXIS 2341 (N.D. Ill. Feb. 15, 1991). Thus, the proper inquiry is whether persons of ordinary intelligence would know that Fryar's myriad of criminal offenses at issue here constitutes a pattern of racketeering activity. Fryar has not and cannot establish that the statute failed to give fair notice that *his* conduct was forbidden. A person of ordinary intelligence could hardly not realize that Fryar's repeated use of the mails and wires to knowingly mislead over 500 prospective bondholders about a land transaction that significantly affected Westside's financial structure from which he

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(1987) (rejecting argument that RICO claims were quasi-criminal and not subject to arbitration); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302-03 (7th Cir. 1987), *cert. denied*, 492 U.S. 917, 109 S. Ct. 3241 (1989) (rejecting the argument that RICO was quasi-criminal in nature); *U.S. v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S. Ct. 1121 (1975) (a civil RICO action should not be judged by the criminal standards of constitutional protection).

enriched himself by more than $2,000,000 did not fall within the ambit of RICO. Fryar's constitutional challenge is totally devoid of merit.

7. Fryar's Due Process Rights Were Not Violated.

Fryar argued for the first time in his Petition for Rehearing (A-51) to the Court of Appeals that reconsideration of the jury verdict in light of this Court's decision in *H.J.* constitutes an "impermissible retroactive application of a change of substantive law" violative of his due process rights.[8] Fryar cites no authority for this novel proposition. Moreover, the basic premise of Fryar's argument is faulty – that this Court's decision in *H.J.* constituted a substantive expansive change in the law. (Petition for Certiorari, pp. 35-36). To the contrary, as explained by the Court of Appeals:

> *H.J.* has, if anything, resolved rather than revolutionized the law . . .
>
> 946 F.2d at 1167.

Fryar, nevertheless, argues that this Court's decision in *H.J.* expanded the parameters of RICO. Fryar's argument turns logic on its head. *H.J.*, if anything, casts a significantly smaller net over RICO defendants than under *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), the prior Fifth Circuit precedent under which proof of only two predicate acts established a pattern of

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[8] The Court of Appeals specifically identified the three questions of law before it on appeal. 946 F.2d at 1165. Conspicuously absent from the list are Fryar's due process and Seventh Amendment arguments asserted here.

racketeering activity. *H.J.*, thus, narrowed and clarified the statute rather than expanded it. No authority has been found supporting the proposition that application of a decision clarifying and narrowing of a statute violates due process.[9] Indeed, courts have rejected Fryar's argument where judicial expansion of a statutory construction occurs if such construction is expected and defensible. *U.S. v. Martino*, 648 F.2d 367 (5th Cir. 1981), *cert. denied sub nom, Lazzara v. U.S.*, 456 U.S. 943, 102 S. Ct. 2007 (1982), *cert. denied*, 456 U.S. 949, 102 S. Ct. 2020 (1982); *U.S. v. Angiulo*, 847 F.2d 956 (1st Cir.), *cert. denied sub nom, Cincotti v. U.S.*, 488 U.S. 852, 109 S. Ct. 138, *cert. denied*, 488 U.S. 928, 109 S. Ct. 314 (1988) (rejecting due process argument where change of construction of RICO statute regarding "enterprise" was foreseeable). If an expected and defensible judicial expansion of a statute may be retroactively applied without violating due process, *a fortiori* judicial narrowing and classification of a statute may be retroactively applied.

Further, acceptance of Fryar's argument does not require review of the decision below. If Fryar's argument is correct, then the law in effect at the time as enunciated

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[9] In contrast, where a decision clearly expands the scope of a criminal statute prohibiting conduct implicating First Amendment values, the decision cannot be applied retroactively. *Marks v. U.S.*, 430 U.S. 188, 97 S. Ct. 990 (1977) (petitioners entitled to jury instructions fashioned under prior case law where decision expanded definition of obscenity); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697 (1964) (judicial expansion of criminal statute cannot be applied retroactively). The principles of *Marks* and *Bouie* cited by Fryar do not apply to this case involving neither a criminal statute nor First Amendment conduct.

in *R.A.G.S.* must apply. Under *R.A.G.S.*, Fryar's conduct clearly was violative of RICO, as previously found by the Fifth Circuit. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988). Further review is not required.

8. Reconsideration by the District Court did not Infringe Upon Fryar's Right to Trial by Jury.

Fryar also argued for the first time in his Petition for Rehearing that reconsideration of the jury verdict in light of *H.J.* by the district court infringed upon his right to a trial by jury, violative of the Seventh Amendment. Fryar's argument is disingenuous and diametrically opposed to Fryar's contentions in the Court of Appeals. Rather than arguing that a jury must reconsider the verdict in light of *H.J.*, in the Court of Appeals Fryar sought to prevent the district court from considering the issues. In a Motion to Recall the order remanding the case to the district court, Fryar argued to the Court of Appeals that "the legality of respondents' civil RICO claims against movant should be decided by this Court *based on the record on appeal*". (A-61). Fryar never requested that the issue be considered by a jury. (A-59). Having so argued that the case should be reconsidered based on the record on appeal, and having failed to request a new trial by jury or to object to entry of the judgment on that ground, Fryar clearly has waived his right to do so. *U.S. v. 1966 Beechcraft Aircraft Model King Air*, 777 F.2d 947 (4th Cir. 1985) (claimants failure to object to district court's resolution of issues constitutes a waiver of right to jury trial).

Further, Fryar's argument rests upon a faulty premise – that every remand for reconsideration of a jury

verdict in light of a subsequent appellate decision requires a remand to the district court for a new trial. To the contrary, as Fryar previously argued the Supreme Court's directive clearly contemplated that "the legality of respondents' civil RICO claims against movant should be decided by this Court *based on the record on appeal.* The resolution of that legal question by this Court will impart finality thereto, except as the Supreme Court may decide to review such a decision on application for a writ of certiorari." (A-61-62). Accordingly, Fryar's right to a jury trial has not been infringed.

CONCLUSION

Fryar's failure to timely urge the arguments offered in his Petition for Certiorari is fatal; the untimely arguments should not be considered. Moreover, the arguments are meritless. The RICO statute as applied to Fryar's fraudulent conduct spanning more than ten years and victimizing over 500 bondholders is not unconstitutionally vague. Consideration of the jury's verdict in light of *H.J.* neither is violative of Fryar's due process rights or

the right to a trial by jury. For these reasons, Fryar's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Joe E. FRYAR, Defendant-Appellant.

No. 88-4200.

United States Court of Appeals,
Fifth Circuit.

March 1, 1989.

Rehearing Denied April 18, 1989.

Clinard J. Hanby, Houston, Tex., J. Minos Simon, Lafayette, La., for defendant-appellant.

John P. Lydick, Asst. U.S. Atty., Joseph S. Cage, Jr., U.S. Atty., John A. Broadwell, Asst. U.S. Atty., Shreveport, La., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellant, Joe E. Fryar, challenges his conviction following a jury's guilty verdict on eight counts of jury tampering and conspiracy to corruptly influence a jury. We find no error and affirm.

I.

A jury convicted Fryar on eight counts of obstruction of justice, conspiracy, and aiding and abetting under 18

U.S.C. §§ 2, 371, and 1503. The charges stemmed from efforts to bribe three jurors during the trial of a civil case in the United States District Court for the Western District of Louisiana, in which Fryar was a defendant. The government presented evidence that Fryar conveyed bribe offers to two jurors using intermediaries. Two of those intermediaries testified for the prosecution.

On the government's motion, the district court sequestered the jury that was hearing Fryar's jury tampering case in a section of the Holiday Inn in Monroe, Louisiana. Two marshals were stationed in an end room at the head of the staircase; another was positioned in a room at the other end of the jurors' rooms. The drapes in both rooms were open. The marshals also placed yellow cones bearing "No Trespassing" signs at each end of the balcony.

As the jurors chatted in the courthouse jury room on Saturday, January 30, 1988, juror Steven Faulkner stated that a woman had come to his room about 1:30 a.m. Saturday. Several jurors, including Pam Guillot, advised him to report the visit to the marshals. Faulkner said he had told the marshals about the visit that morning, and then clarified his description of the visit. Faulkner, whose room, 250, was three doors down from the guards' command post room, told the other jurors that a young woman had knocked on his motel door the night before looking for a fraternity party. He said he told the woman he knew nothing about the party and closed his door.

While the jurors watched a movie Saturday night in one of the hotel rooms, a dance scene prompted Guillot to ask Faulkner if the dancer looked like the woman who

had come to his room the night before. Deputy Marshal James Rea overheard the remark and asked Guillot what she was talking about; she repeated Faulkner's earlier statements. Rea told two other marshals about the statement, after which the three marshals asked Faulkner to step out of the room. When they asked him which marshal he had told about the visit, Faulkner said he could not remember.

On Sunday morning one of the marshals told Deputy Marshall James Pleicones about Faulkner's statements. Faulkner repeated his story to Pleicones outside the presence of the other jurors. When Pleicones asked which marshal Faulkner had informed, Faulkner first said he had told Pleicones. After Pleicones denied being told, Faulkner said he must have told Deputy Marshal David Murphy. When Murphy also denied being told, Faulkner said he could not remember who he had told but added that juror Guillot would know. Pleicones then talked with Guillot alone, who recounted her jury room conversation with Faulkner but said she did not see Faulkner tell any marshals about the incident.

After the morning break on Monday, February 1, 1988, the district court recessed the trial temporarily to interview the marshals and jurors in chambers. The three marshals on guard duty during the Friday-to-Saturday overnight shift told the court they neither saw nor heard anyone walking on the balcony or knocking on the jurors' doors. The district court then interviewed Faulkner and Guillot separately. Faulkner described the visit and its aftermath again. Guillot confirmed the jury room conversation with Faulkner but stated that she did not think the visit had occurred. Guillot also stated that the Faulkner

incident would not influence her ability to decide the case fairly and impartially. The court did not ask Faulkner whether he still could decide the case fairly and impartially.

The district court then excused Faulkner from the jury over Fryar's objection. The court concluded that Faulkner lied about the visit, had continued to lie in the face of questioning, and thus was not fit to serve as a juror. Alternate juror Eddie Rice took Faulkner's place and eventually became the foreman. The court denied Fryar's motion to remove Guillot from the jury.

The court then interviewed the remaining jurors separately about the incident. Five said they believed the visit had not occurred, five thought it had occurred, and three said they were not sure. All said the Faulkner incident would not affect their impartiality. The court admonished each juror individually not to discuss the interview with the other jurors.

After reconvening, the district court instructed all of the jurors with Fryar's consent to draw no conclusions or inferences from Faulkner's excusal. Fryar moved for a mistrial on grounds that the taint of Faulkner's dismissal persisted because five jurors believed his story about the visit. The court denied this motion and Fryar's renewed motion to excuse Guillot.

Fryar moved for a new trial after his conviction on grounds that the district court had excused juror Faulkner erroneously. During a post-trial hearing on the motion, Fryar presented Karen Gant and her sister, Juanita Woods, in an effort to prove that a woman had knocked on Faulkner's door early Saturday morning.

Gant testified that her sister had told her that a fraternity would be holding a party Friday night, January 29, 1988, in room 254 or 250 at the Holiday Inn in Monroe. She stated that she knocked on three or four doors in the 250-series while looking for the party; one person fitting the general physical description of juror Faulkner opened the door and told her she had the wrong room, according to Gant. She testified that she spoke loudly at the doors, saw no warning signs or open drapes, and saw nothing to distinguish the row of rooms from any other in the hotel.

Deputy Marshal Richard Frandsen also testified during the hearing about the placement of warning signs in the hotel stairwells. Frandsen, who was not on duty that Friday night, said he told each deputy of the sign requirement and, in anticipation of the fraternity party, warned them to be especially watchful Friday night. Frandsen stated that the warning signs were in open view each time he visited the hotel during the jury's sequestration. The district court concluded that Gant did not know for certain which doors she had knocked on that night and denied Fryar's new trial motion.

Following the sentencing and after filing notice of appeal, Fryar moved for release on bond pending appeal and filed a supplement to the motion. The supplement alleged that juror Eddie Rice had failed to disclose a prior conviction for driving while intoxicated after being asked on voir dire whether he had ever been convicted of or pled guilty to a crime. The court, with the parties' consent, treated the supplement as a motion for new trial and ordered a hearing. Rice acknowledged at the hearing that he had pled guilty to a D.W.I. charge in 1987. However,

the court concluded that Rice had mistakenly but justifiably assumed that a D.W.I. conviction was considered a traffic offense rather than a crime, and denied Fryar's motion for new trial. Fryar appeals.

II.

1.

In his first attack, Fryar seeks to portray the alleged visit to Faulkner as an extrinsic influence on a juror regarding a matter pending before the jury, which creates a rebuttable presumption of prejudice to the defendant. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir.1984), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985). But the Faulkner incident is more properly characterized as juror misconduct given the district court's finding that the purported visit did not happen. As such, we review the district court's actions under the abuse of discretion standard. *See United States v. Dominguez*, 615 F.2d 1093, 1095 (5th Cir.1980); *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.) *cert. denied sub nom. Wallace v. United States*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977). Further, the *Remmer* presumption of prejudice does not come into play here even if we assume that the contact occurred because absolutely no evidence suggests that the purported visitor tried to talk to Faulkner about the trial. *See Remmer*, 347 U.S. at 229, 74 S.Ct. at 451; *United States v. Burke*, 496 F.2d 373, 377 (5th Cir.), *cert. denied*, 419 U.S. 966, 95 S.Ct. 229, 42 L.Ed.2d 182 (1974).

Fryar, relying heavily on the testimony of Karen Gant, argues that the district court erred when it concluded that no visit occurred and dismissed Juror Faulkner. We cannot agree that the district court's resolution of this fact issue, based on the conflicting testimony of Faulkner, Gant and the marshals, is "wholly unsupported by the evidence." *See United States v. O'Keefe*, 722 F.2d 1175, 1178 (5th Cir.1983); *United States v. Granza*, 427 F.2d 184, 185 (5th Cir.1970).

Gant's testimony about the incident was imprecise and uncertain. She recalled that she knocked on doors 254 and 250 while searching for the party, yelled or talked loudly through the hotel doors, and stated that a short and sleepy-looking black man answered door 250. She also stated that she saw no warning signs, marshals or open drapes. But Gant, who testified that she was "vague" about the details of her search because she was anticipating the party at the time, repeatedly said she was not sure about particular room numbers.

The district court was entitled to weigh this equivocal testimony against the statements of the marshals on guard duty that night. The marshals stated that (1) they heard and saw no visitors in the hall that night; and (2) the placement of their guard posts – one of which was three doors down from Faulkner's room – made it unlikely that a visitor could escape detection while knocking and yelling at the jurors' doors.

The marshal's testimony supports the distict court's decision to reject Faulkner's testimony. The district court also was entitled to resolve the dispute about whether Faulkner reported the alleged visit to the marshals and

conclude that Faulkner lied about reporting it. The court did not abuse its discretion in concluding that the visit did not occur and that Faulkner had lied.

The district court has the discretion to excuse an untruthful juror. *See Dominguez*, 615 F.2d at 1095; *Smith*, 550 F.2d at 285. Nor did the court exceed its discretion when it evaluated juror Guillot's statements, accepted her pledge of impartiality and refused to excuse her for lack of candor or her contacts with Faulkner. Her conversations with the marshals and the Court related to the Faulkner incident, not to Fryar's case.

Similarly, the scope of an investigation into juror misconduct rests with the court's discretion. *Tillman v. United States*, 406 F.2d 930, 938 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). We detect no abuse of that discretion in the court's individual interviews with the jurors and marshals, or in its instruction that the jurors should draw no conclusions from Faulkner's dismissal. Nor do we detect any actual prejudice to Fryar from this incident. All of the remaining jurors affirmed their ability to decide this case impartially; we see no reason to doubt the district court's determination that they were sincere. *See Smith v. Phillips*, 455 U.S. 209, 217 n. 7, 102 S.Ct. 940, 946 n. 7, 71 L.Ed.2d 78 (1982).

We decline Fryar's invitation to presume that this juror misconduct prejudiced Fryar because the misconduct and investigation involved a sequestered jury hearing a jury tampering case. Fryar's reliance on *United States v. Shapiro*, 669 F.2d 593 (9th Cir.1982), is misplaced. In *Shapiro*, the Ninth Circuit held that the district court

should have granted a mistrial after one juror attempted to extort money from a party in return for a favorable verdict. The Ninth Circuit concluded that the entire panel had been tainted because: (1) several jurors' responses to a special voir dire indicated that the jurors had discussed the case among themselves; and (2) the form of the district court's voir dire questioning planted the idea in jurors' minds that out-of-court misconduct by the prosecution or the defendants had prompted the questioning.[1] Given this situation, the Ninth Circuit presumed that the defendants had been prejudiced. *Id.* at 603.

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[1] The Ninth Circuit included this excerpt from the trial transcript:

> THE COURT: Do you have any idea or suspicion about the reason for this questioning of you?
>
> JUROR CHUMLEY: I really hadn't thought about it, but no, I don't. It does make a person wonder. There obviously has to be a reason.
>
> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?
>
> JUROR CHUMLEY: Now this is what I should have been – normally would have been thinking about during lunch and everything, but we had a large lunch and we have been playing cards and I really had not thought about it.
>
> THE COURT: I am just planting thoughts in your mind, huh?
>
> JUROR CHUMLEY: In a sense, yes.

Shapiro, 669 F.2d at 601. Another juror responded unequivocally that she did believe a party's misconduct had prompted the court's questioning. *Id.* at 602.

Fryar's case does not present such an egregious situation. The district court asked the jurors individually (1) what they had heard about the incident; (2) what inferences they drew from it; and (3) whether it would affect their ability to be fair and impartial. Unlike that court's questions in *Shapiro*, these generic questions do not suggest misconduct by either party.

Similarly, Faulkner's misconduct itself is insufficient to create a presumption of prejudice here. The Fifth Circuit considered *Shapiro* in a case in which a juror announced in the jury room before closing arguments had ended that the defendants "were guilty from day one [and] that he . . . wasn't listening to the argument." *Webster*, 750 F.2d at 336. The court dismissed the offending juror, interviewed the remaining jurors individually and concluded that they had not been tainted. *Id.* at 337. In refusing to adopt *Shapiro's* presumption of prejudice in these circumstances this court stated:

> [S]itting as we do far from the daily rigors of trial, we are in a particularly inappropriate position from which to judge the effect of a juror's premature expression of an opinion as to guilt on the minds of the other members of the jury panel. That is precisely why we have traditionally left the manner of handling jury misconduct to the sound discretion of the trial judge.

Webster, 750 F.2d at 338 (citations omitted). This reasoning applies with equal force to Fryar's situation.

Finally, Fryar asks us to find prejudice in the marshals' interviews with Faulkner and Guillot on Saturday

and Sunday. Once again we perceive no abuse of discretion in the district court's refusal to grant a new trial based on these contacts. *See United States v. Albert*, 595 F.2d 283, 290 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979). We also note that Fryar has waived any argument to excuse Guillot based on the contacts with marshals because he made no motion below to excuse her on these grounds.

2.

Fryar argues that juror Eddie Rice's failure to disclose on voir dire a prior conviction for driving while intoxicated denied him the right to an impartial jury. We review the district court's refusal to grant a new trial on these grounds for abuse of discretion. *United States v. Fowler*, 735 F.2d 823 (5th Cir.1984).

At the post-trial hearing Rice admitted that he had pled guilty to a D.W.I. charge in 1987. However, he stated that he did not remember hearing the question about prior convictions when the district court asked it generally of the jurors. Rice also stated that if he had heard the question he would have considered D.W.I. to be a mere traffic violation rather than a "crime;" he added that his lawyer told him it counted as a traffic violation.

The court concluded that Rice probably heard the question but did not purposely answer it untruthfully. The court noted a possible source of Rice's confusion in its colloquy with another juror; when that juror asked if traffic violations counted as "crimes," the court responded that speeding was not a crime. Under these facts we perceive neither an abuse of discretion by the

district court nor any reason to presume bias to Fryar from Rice's inaccurate answer. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976). Thus, we find no merit in Fryar's companion argument that Rice's inaccurate answer impaired Fryar's ability to exercise his peremptory challenges.

3.

In his next point, Fryar claims that the district court improperly excluded evidence of prior grand jury testimony during his cross-examination of Richard Davis, who testified for the government under a grant of immunity. Davis testified that Fryar asked him to find a way to contact three jurors and get them to vote in Fryar's favor in the civil case. During an offer of proof outside the jury's presence, Davis stated that he had testified before grand juries in 1960, 1972 and 1983 or '84; he testified under a grant of immunity at the 1972 grand jury appearance. The district court, finding that the potentially-prejudicial effect of the testimony exceeded its probative value, excluded the testimony under Fed.R.Evid. 403.

The scope of cross-examination and its limits rest with the district court's discretion. *United States v. Balliviero*, 708 F.2d 934, 940 (5th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 351, 78 L.Ed.2d 316 (1983). Fryar argues that Davis' prior grand jury appearances were crucial to his theory that Davis acted on his own in trying to bribe the jurors because he knew he could make a deal with the government if he got into trouble. We find no abuse of discretion in the court's conclusion that the danger of prejudice from evidence of a fifteen-year-old grant of

immunity and two unrelated grand jury appearances dating back twenty-eight years outweighed the probative value. This history provides no significant support to Fryar's argument that the government would approve future grants of immunity.

4.

Finally, Fryar claims that the district court infringed his sixth amendment right to confront witnesses when it denied his request to reveal a confidential informant's identity.

Under *Roviaro v. United States*, 353 U.S. 53, 62, 77 S.Ct. 623, 628, 1 L.Ed.2d 639 (1957), courts must make disclosure decisions by balancing the individual's right to prepare a defense against the public interest in encouraging the flow of information from informants by preserving their anonymity. In applying this test, this court has held that *Roviaro* does not require the disclosure of the identities of "mere tipsters." *United States v. Fisher*, 531 F.2d 783, 787 (5th Cir.1976); *see also United States v. De Los Santos*, 810 F.2d 1326, 1334-35 (5th Cir.) (informant's privilege overrides sixth amendment right to confrontation), *cert denied*, ___ U.S. ___, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987).

After reviewing the sealed F.B.I. documents included in this record and the edited transcript from the civil trial hearing at which the F.B.I. first brought the information to light, we conclude that the informant was a tipster. The

district court did not err in denying disclosure of the tipster's identity.

The court's judgment of conviction is

AFFIRMED.

EXHIBIT 3

TO MAX RE: FLEMING

THE TRIAL IS A CIVIL ACTION AND OCCURS ON DECEMBER 1, 1986. IT IS NOT CRIMINAL – FLEMING DOES NOT HAVE TO TESTIFY AND SHOULD NOT.

FLEMING SHOULD RESIST BEING DEPOSED. HARGAN IS ACQUAINTED WITH THE CASE AND SHOULD REPRESENT HIM. THE FOLLOWING POINTS ARE MADE:

1. A.A. IS AN EXEMPT COMPANY AND SHOULD BE PROTECTED BY BERMUDA'S SECRECY LAWS.

2. FLEMING HAS A DUTY AND OBLIGATION OF CONFIDENTIALITY REGARDING HIS CLIENTS BUSINESS AND RECORDS.

3. FLEMING HAS NO RIGHT TO POSSESS ANY ORIGINALS, COPIES, CORRESPONDENCE, RECORDS OR RECOLLECTIONS PERTAINING TO A.A. AND SHOULD IMMEDIATELY SURRENDER ANY THAT HE HAS TO THE COMPANY AND FORGET ANYTHING THAT HE RECALLS.

4. TESTIMONY RELATIVE TO FUNDING A.A. VIA ANGLO AND FRYAR'S INVOLVEMENT WITH ANGLO WOULD BE VERY DAMAGING TO A.A.'S EFFORTS TO RECOVER THE BONDS.

5. ANY LOSS THAT A.A. SUFFERS BECAUSE OF FLEMING'S RECORDS, TESTIMONY OR VIOLATING THE CONFIDENTIALITY OF A.A.'S BUSINESS WILL CAUSE A.A. TO

SEEK ECONOMIC RECOVERY VIA LEGAL ACTION AGAINST FLEMING.

6. IF HE AVOIDS BEING DEPOSED OR UPON BEING DEPOSED, RESPECTS THE CONFIDENTIAL RELATIONSHIP BETWEEN HIMSELF AND A.A., THEN HE CAN EXPECT TO RETAIN A GOOD AND GENEROUS CLIENT. BUT IF HE DIVULGES OUR BUSINESS, THEN IT WILL BE INCUMBENT ON A.A. THRU THE COURTS TO LET HIS PRESENT AND FUTURE CLIENTS KNOW THE LOOSENESS WITH WHICH THEIR BUSINESS DEALINGS ARE HANDELED [sic]. THIS WILL HARDLY INSPIRE CONFIDENCE IN CLIENTS OF FLEMING.

J. H. SMITHERS

89-160

CRIMINAL DOCKET

TITLE OF CASE

THE UNITED STATES

vs.

MICHAEL WAYNE BOUDREAUX	(CTS. 1 - 14)
JOSEPH E. FRYAR	(CTS. 7 - 11)
MALCOLM ZIEGLER	(CTS. 7 - 11 & 14)
LUTHER RICHARDSON, JR.	(CTS. 7, 9, 11)
Super. Indict.- LEO FONTENOT	(CT. 7)
THOMAS M. BOUTWELL	
RORY HARRIS	

REPORT CURRENCY TRANSACTIONS

18:371 Ct. 7

18:1956(a)(3) Cts. 8 & 9

18:2 Cts. 8 - 11 & 14

31:5313(a) Cts. 1 - 6 & 10 - 14)

31:5322(b) Cts. 1 - 6 & 10 - 14)

31:5324(3) Cts. 2, 4, 6 & 13)

31:5324(1) Cts. 10 & 11

31CFR 103.22 Cts. 1-6 & 10 - 14)

31CFR 103.25 Cts. 1-6 & 10-14)

ATTORNEYS

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For: Richardson

ADDL ATTYS CO:

CASH RECEIVED AND DISBURSED

DATE
MONDAY, OCTOBER 30, 1989
9:30 AM

Courtroom Deputy: Pam Radosta
Court Reporter – Tom Conrad

ARRAIGNMENT ON 4th SUPERSEDING INDICTMENT (DEFT. JOSEPH FRYAR)

Deft. present to Plea Guilty as to **COUNTS 2 AND 6** of the 4th Superseding Indictment.

Deft. Sworn and questioned by the court.

Deft. informed of rights to trial by jury or the court and waives same.

4th Superseding Indictment (Cts 2 & 6) read to the deft. by the court.

Deft. informed of the maximum penalties.

Deft. informed of sentence guidelines.

Deft. enters a plea of Guilty.

Plea Bargain disclosed to the court in letter form and same is filed.

Government states the facts of the case to the court.

Plea Accepted and deft. is Adjudged Guilty on plea of Guilty.

Pre-sentence investigation ORDERED.

Deft. remanded

DATE OF ENTRY NOV 02 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., and CAREY WALTON, ET AL	CIVIL ACTION
VERSUS	NUMBER: 84-1786 "O"
POTOMAC INSURANCE COMPANY, ET AL	(JUDGE SHAW)
	(MAGISTRATE METHVIN)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS CIVIL RICO CLAIMS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER UPHOLDING JURY VERDICT, READJUSTING ATTORNEYS' FEE AWARD, AND RECALCULATING INDIVIDUAL PLAINTIFFS' DAMAGE AWARD

MAY IT PLEASE THE COURT:

(I). STATEMENT OF THE CASE

This Court has granted defendant **Joe E. Fryar** until **Monday, May 7, 1990,** to provide it with his pleadings and memoranda directed to the issues raised by the United States Court of Appeals for the Fifth Circuit's remand of the above captioned civil action for further proceedings in light of ***H.J. Inc. v. Northwestern Bell Telephone Company,*** **492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).** Defendant has responded by filing

simultaneously herewith a motion to dismiss the civil RICO claims asserted against him by the plaintiff-class of bondholders in **Westside Rehabilitation Center** (plaintiffs). Defendant submits this memorandum in support of his motion to dismiss and in opposition to plaintiffs' motion for order upholding jury verdict, readjusting attorneys' fee award, and recalculating individual plaintiffs' damage award.

Defendant's motion to dismiss sets forth the tortured procedural history of this case in detail, as well as the grounds relied upon for the relief he seeks. Succinctly stated, defendant alleges that this Court should find that **18 U.S.C. §§ 1961, et. seq.**, violates the procedural due process guarantee of **U.S.C. Const. Amend. 5** that appropriate notice of a proscription must be given before a person can be held accountable for its violation. Alternatively, defendant alleges that this Court should find that **18 U.S.C. §§ 1961, et. seq.**, does not reach the isolated and sporadic criminal acts shown by respondents in this case. Thereafter, based on either of these findings, this Court should dismiss the civil RICO claims asserted by plaintiffs against defendant.

(II). LAW AND ARGUMENT

(A). 18 U.S.C. §§ 1961, ET. SEQ., IS VOID FOR VAGUENESS

Defendant initially contends that **18 U.S.C. §§ 1961, et. seq.**, violates one of the procedural due process guarantees emanating from **U.S.C. Const. Amend. 5,** i.e., appropriate notice of a proscription must be given before

a person can be held accountable for its violation. Plaintiffs' civil RICO claims asserted against defendant arise under **18 U.S.C. §§ 1961, et. seq.** In particular, plaintiffs rely on **18 U.S.C. § 1964(c)**, which provides:

> **"§ 1964. Civil remedies**
>
> (c) ***Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court*** and shall recover ***threefold the damages he sustains*** and the cost of the suit, including a reasonable attorney's fee." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Consequently, plaintiffs alleged and attempted to prove that defendant violated **18 U.S.C. "§ 1962**, which provides:

> **"§ 1962. Prohibited activities**
>
> (a) ***It shall be unlawful for*** any person who has received any income derived, directly or indirectly, from ***a pattern of racketeering activity*** or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another

to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer. (b) ***It shall be unlawful for*** any person through ***a pattern of racketeering activity*** or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) ***It shall be unlawful for*** any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate,directly or indirectly, in the conduct of such enterprise's affairs through ***a pattern of racketeering activity*** or collection of unlawful debt.

(d) ***It shall be unlawful for*** any person ***to conspire to violate*** any of the provisions of subsection (a), (b), or (c) of this section." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Based on this statutory language, **18 U.S.C. §§ 1962** and **1964** render civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, **18 U.S.C. § 1962(a);**

who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," **18 U.S.C. § 1962(b);** who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity," **18 U.S.C. § 1962(c);** or, finally, who conspires to violate the first three subsections of **18 U.S.C. § 1962, 18 U.S.C. § 1962(d).** RICO provides for drastic remedies: conviction for a violation of RICO carries severe criminal penalties and forfeiture of illegal proceeds, **18 U.S.C. § 1963;** and a person found in a private civil action to have violated RICO is liable for treble damages, costs, and attorney's fees, **18 U.S.C. § 1964(c).**

The essential elements a plaintiff must prove to establish a civil RICO claim depend upon which subsection of **18 U.S.C. § 1962** the plaintiff is alleging the defendant violated. However, the well-settled jurisprudence establishes that there are certain essential elements common to all civil RICO claims. The district court in ***Occupational-Urgent Care Health Systems, Inc. v. Sutro & Company, Inc.,*** 711 F. Supp. 1016 (E.D. Ca. 1989), noted the essential elements common to all civil RICO claims, when it held:

> "The precise requirement for establishing a civil RICO cause of action depends on which subsection of the statute a plaintiff invokes; however, ***the following are essential elements of any civil RICO action***: ***(1)*** the existence of a RICO 'enterprise' ***(2) the existence of a 'pattern of racketeering activity'; (3)*** a nexus between the defendant and either the pattern of racketeering activity or the RICO 'enterprise'; and

> *(4)* resulting injury to plaintiff, in his 'business or property.' See [citations omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1021.

See also ***Klapper v. Commonwealth Realty Trust,*** 657 F.Supp. 948 (D. Del. 1987); and, ***Eaby v. Richmond,*** 561 F.Supp. 131 (E.D. Pa. 1983).

Thus, it is essential to the proscriptions of **18 U.S.C. §§ 1961, et. seq.,** to determine what is meant by a **"pattern of racketeering activity".** A defendant may not be held civilly or criminally liable under **18 U.S.C. §§ 1961, et. seq.,** unless a "pattern of racketeering activity" can be shown to exist. **18 U.S.C. § 1961(5)** purports to define this essential element of a "pattern of racketeering activity":

> **§ 1961. Definitions**
>
> As used in this chapter –
>
> (5) ***"pattern of racketeering activity" requires at least*** two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . ". (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Clearly, **18 U.S.C. § 1961(5)** does not set forth a definition or notice of what constitutes a "pattern of racketeering activity." Instead, the statute *only* sets forth a minimum necessary condition for the existence of such a pattern. **18 U.S.C. §§ 1961, et. seq.,** does *not* contain any

other provision relating to the essential element of a "pattern of racketeering activity."

> **U.S.C. Const. Amend. 5** provides:**"Amendment 5 – Grand jury indictment for capital crimes; Double jeopardy; Self-incrimination; Due process of law; Just compensation for property**
>
> ***No person shall*** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of life, liberty, or property, without due process of law;*** nor shall private property be taken for public use, without just compensation." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

As such, **U.S.C. Const. Amend. 5** guarantees to defendant the right not to be deprived of his property without due process of law. This guarantee of procedural due process includes the requirement that defendant be given appropriate notice of the proscriptions of **18 U.S.C. §§ 1961, et. seq.**, before he can be held accountable for violating those statutes. The fact that plaintiffs are proceeding under the civil provisions of **18 U.S.C. §§ 1961, et. seq.**, is of no moment, as the aforementioned procedural due process guarantee applies to civil statutes as well criminal statutes.

The Supreme Court in ***A. B. Small Company v. American Sugar Refining Company,*** 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925) *affirmed* a district court's judgment, which held certain portions of the Lever Act regulating profits made on the sale of certain necessaries such as sugar to be unconstitutional. In particular, the district court found that those sections which utilized terms such as "unjust", "unreasonable" and "excessive" in describing prohibited transactions were unconstitutionally vague. On Writ of Error to the Supreme Court, the defendants argued that the void-for-vagueness doctrine applied only to criminal statutes and thus could not be used to invalidate the civil statute at issue. ***A. B. Small Company,*** supra, rejected the defendants' arguments, holding:

> ***"The defendant attempts to distinguish those cases because they were criminal prosecutions.*** But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.***It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.*** Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. ***They have been so construed and applied by other courts in civil proceedings.*** [citations omitted]. In the first of these citations, the Court of Appeals of New York, referring to this court's ruling in the Cohen Grocery Co. Case, well said:

> *'The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established.* * * * The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions.*A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty.'*

Id. 45 S.Ct., at p. 297.

See also *Giaccio v. State of Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); *Jones v. City of Lubbock,* 727 F.2d 364 (5th Cir. 1984); *Exxon Corporation v. Busbee,* 644 F.2d 1030 (5th Cir. 1981); and, *Leonen v. Johns-Manville Corporation,* 717 F.Supp. 272 (D. N.J. 1989).

The standards for evaluating vagueness were enunciated by the Supreme Court in *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In that case, the Supreme Court upheld an anti-noise ordinance against a challenge that it was unconstitutionally vague. However, in discussing the principles underlying the void-for-vagueness doctrine, *Grayned,* supra, held:

> "The anti-noise ordinance reads, in pertinent part, as follows:
>
> . . .

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, ***we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.*** Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. ***A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*** Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' ***Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.' "*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 92 S.Ct., at pp. 2298 and 2299.

See also ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,*** 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); ***Papachristou v. City of Jacksonville,*** 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); ***United States v. Professional Air Traffic Controllers Organization,*** 678 F.2d 1 (1st Cir. 1982); and, ***Postscript Enterprises, Inc. v. Whuley,*** 658 F.2d 1249 (8th Cir. 1981).

Similarly, in ***DiLeo v. Greenfield,*** 541 F.2d 949 (2nd Cir. 1976), the United States Court of Appeals for the Second Circuit noted the constitutional requirement of adequate, prior warning of prohibited behavior, holding:

> ***"The notion of due process requires that sanctions be imposed on individuals only if they could reasonably have known in advance that their questioned behavior had been proscribed.*** In accordance with this principle, the Supreme Court has held that a statute may be void for vagueness in order to ensure that individuals are fairly apprised in advance regarding the specific conduct which the legislature has prohibited. See [citations omitted]. DiLeo contends that the Connecticut statute which authorized his dismissal for "other due and sufficient cause" failed sufficiently to inform him of the kind of conduct which is proscribed. We disagree.
>
> We do not agree with the district court that vagueness in the statute could be cured by subsequent explanation by the Board of which acts it charged as falling within the scope of § 10-151(b)(6). ***Due process requires prior notice of what constitutes forbidden behavior.*** See [citation omitted]." (Emphasis added). (COPR.

(C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. p. 953.

The Supreme Court in ***Federal Communications Commission v. American Broadcasting Company, Inc., et al,*** 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), had occasion to construe certain statutes that, like the RICO statutes, provided both civil and criminal penalties for their violation. In that case, the Supreme Court rejected the FCC's contention that the statutes could be broadly construed in the civil context, but narrowly construed in the criminal context. ***Federal Communications Commission,*** supra, held:

> ***"It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.*** If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also ***it would do violence to the well-established principle that penal statutes are to be construed strictly."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 74 S.Ct., at pp. 600-601.

In his dissent in ***H.J., Inc.,*** Justice **Scalia** cites ***Federal Communications Commission,*** supra, for the proposition that RICO, since it has criminal applications, must, even

in its civil applications, possess the degree of certainty required for criminal laws. Thus, a court may not broadly construe RICO's provisions in the civil context, but then narrowly construe those same provisions in the criminal context. As a penal statute, RICO is to be strictly construed whatever its meaning.

The United States Court of Appeals for the Fifth Circuit in ***Exxon Corporation,*** supra, noted that the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes. On this issue, ***Exxon Corporation,*** supra, held:

> ***"While it is true that the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes,*** [citation omitted], and in the area of first amendment rights, [citation omitted], the Supreme Court has recognized that ***"(v)ague laws in any area suffer a constitutional infirmity."*** [citations omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1033.

The holdings of ***Federal Communications Commission,*** supra, and ***Exxon Corporation,*** supra, are important because the United States Court of Appeals for the Fifth Circuit has recognized in the case *sub judice* that the civil RICO statutes are penal in nature. On this point, ***Abell, et al v. Potomac Insurance Company, et al,*** 858 F.2d 1104 (5th Cir. 1988), rehearing en banc denied 863 F.2d 882 (5th Cir. 1988), held:

> ***"We hold that the portion of RICO damages in excess of actual damages is penal.*** Those added damages are "not limited to the damages

suffered"; ***they seem more designed to deter than to compensate.*** As Congress constructed them, the civil provisions of RICO compensate primarily victims of fraud or fraudulent schemes. Had Congress merely wanted to make whole this new class of plaintiffs, it would have limited civil RICO damages to the actual damages commonly available to fraud victims.

However, in promulgating RICO, Congress expressly found that the problem of racketeering was primarily public, not private, including draining resources from the economy, subverting the democratic process, and undermining the general welfare, [citations omitted]. ***We conclude, therefore, that Congress trebled RICO damages as as [sic] part of this overall attack on the public wrongs of organized crime."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. p. 1141.

Under this well-settled jurisprudence, a statute can neither forbid nor require "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Stated another way, no statute may exact "obedience to a rule or standard so vague and indefinite as really to be no standard at all." In enacting **18 U.S.C. §§ 1961, et. seq.**, The Congress was required to adhere to these requirements of procedural due process.

18 U.S.C. § 1961(5) purports to define the essential element of "pattern of racketeering activity" found in **18 U.S.C. § 1962(a), (b)** and **(c)**, but this subsection does nothing more than set forth a minimum requirement

therefor, i.e., "two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." Nowhere in **18 U.S.C. §§ 1961, et. seq.**, is any further definition or guidance given with respect to the meaning of "pattern of racketeering activity."

This constitutional defect existing in **18 U.S.C. §§ 1961, et. seq.**, was recognized by Justice **Scalia**, in his concurring opinion in ***H.J. Inc.***, supra, wherein he stated:

> ***"Four terms ago, in [citation omitted], we gave lower courts the following four clues concerning the meaning of the enigmatic term "pattern of racketeering activity" in the Racketeer Influenced and Corrupt Organizations Act*** (RICO or the Act), [citation omitted]. ***First,*** we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." [citation omitted]. ***Second,*** we pointed out that "two isolated acts of racketeering activity," "sporadic activity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. [citation omitted]. ***Third,*** we quoted a snippet from the legislative history stating "[i]t is this factor of continuity plus relationship which combines to produce a pattern." [citation omitted]. ***Finally,*** we directed lower courts' attention to [citation omitted], which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," [citation omitted]. ***Thus enlightened,***

the district and circuit courts set out "to develop a meaningful concept of 'pattern,'" [citation omitted], and promptly produced the widest and most persistent circuit split on an issue of federal law in recent memory, see, e.g., [citation omitted]. Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), *the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach." [citation omitted].*

. . .

Thus, when **18 U.S.C. §§ 1961(5)** says that a pattern "requires at least two acts of racketeering activity" *it is describing what is needful but not sufficient.* (If that were not the case, the concept of 'pattern' would have been unnecessary, and the statute could simply have attached liability to 'multiple acts of racketeering activity.') *But what that something more is, is beyond me. As I have suggested, it is also beyond the Court.* Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." *It seems to me this increases rather than removes the vagueness.* There is no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law.

That situation is bad enough with respect to any statute, but it is intolerable with respect

> *to RICO.* For it is not only true, as Justice Marshall commented in [citation omitted], that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," [citation omitted], so that clarity and predictability in RICO's civil applications are particularly important; ***but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, [citation omitted]. No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. 109 S.Ct. at 2906 through 2909.

Similarly, the majority in *H.J., Inc.*, supra, virtually conceded the constitutional infirmities existing in **18 U.S.C. §§ 1961, et. seq.**, when it held:

> ***"The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.*** The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope."

(Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at p. 2902.

Certainly, if the justices of the Supreme Court, the circuit judges sitting on the various Courts of Appeals and the district court judges are unable to discern the meaning of "pattern of racketeering acitity" from **18 U.S.C. §§ 1961, et. seq.**, then men of common intelligence must necessarily guess at its meaning and differ as to its application. As such, **18 U.S.C. §§ 1961, et. seq.**, violates the procedural due process guarantee of **U.S.C. Const. Amend. 5** that appropriate notice of a proscription must be given before a person can be held accountable for its violation. In particular, **18 U.S.C. §§ 1961, et. seq.**, forbids "the doing of [acts] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Stated another way, **18 U.S.C. §§ 1961, et. seq.**, exacts "obedience to a rule or standard so vague and indefinite as really to be no standard at all."

For these reasons, this Court should find that **18 U.S.C. §§ 1961, et. seq.**, violates the procedural due process guarantees of **U.S.C. Const. Amend. 5**, and it should dismiss plaintiffs' civil RICO claims asserted against defendant under those statutes.

(B). PLAINTIFFS FAILED TO PROVE ANYTHING MORE THAN "ISOLATED" AND "SPORADIC" CRIMINAL ACTS

Alternatively, defendant contends that plaintiffs failed to prove "a pattern of racketeering activity" under

the specific facts of this case, as that essential element is vaguely defined in ***H.J. Inc.,*** supra. In particular, plaintiffs failed to produce any evidence of racketeering activities engaged in by defendant that amounted to or threatened long-term criminal activity, i.e., the "continuity" requirement for proving the existence of a "pattern of racketeering activity". Instead, plaintiffs were only able to show that defendant engaged in isolated and sporadic criminal acts related to the Westside bond offer. Plaintiffs were thus unable to establish the "continuity" requirement for a "pattern of racketeering activity", which requirement was described by the Supreme Court in ***H.J., Inc.,*** supra, as racketeering activities that amount to or threaten long-term criminal activity. Plaintiffs' failure to prove "continuity" was memorialized by the Court of Appeals in ***Abell,*** supra, when it held:

> "Fryar also contends that RICO requires plaintiffs to prove at least two related predicate acts arising from DISTINCT schemes. See 18 U.S.C. § 1962 (requiring a RICO plaintiff to prove a "pattern of racketeering"). ***Fryar's brief correctly notes that "[p]laintiffs have fashioned their RICO claim from the matrix of their securities law fraud claims."*** From this observation, Fryar concludes that the plaintiffs failed to prove the predicate acts necessary to establish a "pattern of racketeering."
>
> Our cases, however, belie Fryar's legal analysis. In [citation omitted], we held that RICO requires only that the predicate acts alleged be related, not that they arise from separate schemes or incidents. Here, ***plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's***

> ***bond offer.*** R.A.G.S. requires no more. But see [citations omitted]. (Each of these cases criticizes R.A.G.S., but notes that only the court sitting en banc or the Supreme Court may overturn R.A.G.S.)." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1120.

Certainly, a half dozen acts of mail fraud and wire fraud spread over a seven (7) year period (a half dozen racketeering acts occurring between 1976 and 1983 according to plaintiffs) all of which are related to a single, discrete objective which is accomplished do not amount to or threaten long-term criminal activity. Parenthetically, as noted by the Supreme Court in ***H.J., Inc.***, supra, The Congress did not intend that **18 U.S.C. §§ 1961, et. seq.**, reach such isolated and sporadic criminal acts as those shown by plaintiffs in this case. Rather, The Congress intended that the RICO statutes reach long-term criminal activity:

> "Insofar as the concurrence seems to suggest, post, at ___, that very short periods of criminal activity that do not in any way carry a threat of continued criminal activity constitute "obvious racketeer[ing]" to which Congress intended RICO, with its enhanced penalties, to apply, we have concluded that it is mistaken, and that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, ***it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.***" (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at p. 2902 (footnote 4)

The majority in ***H.J., Inc.,*** supra, began its unsuccessful attempt to define the "continuity" requirement for a "pattern of racketeering activity" by describing the concept and stating what is not sufficient to show that it exists:

> "[sic]***"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.*** See [citation omitted]. It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where ***what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements.*** A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: ***Congress was concerned in RICO with long-term criminal conduct.*** Often a RICO action will be brought before continuity can be established in this way. ***In such cases, liability depends on whether the threat of continuity is demonstrated.*** See [citation omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at 2902.

The majority in ***H.J., Inc.,*** supra, then proceeded to give examples of those situations it believed would show that "continuity" was present in a given case:

"Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities – preferring to deal with this issue in the context of concrete factual situations presented for decision – we offer some examples of how this element might be satisfied. *A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.* Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, *the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business.* Thus, the threat of continuity is sufficiently established where *the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.* Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that *the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that*

> ***exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at p. 2902.

A study of these examples establishes that the Supreme Court was merely restating the same basic idea throughout, i.e., there must be evidence of racketeering activities that amount to or threaten long-term criminal activity. The impossibility of extracting anything more than this simple core concept from ***H.J., Inc.***, supra, is amply demonstrated by one of the most recent decisions of the United States Court of Appeals for the Fifth Circuit on the civil RICO statutes, i.e., ***Howell Hydrocarbons, Inc. v. Adams***, 897 F.2d 183 (5th Cir. 1990). In that case, the Fifth Circuit ***affirmed*** a district court's summary judgment rendered in favor of the defendants on the ground that the plaintiff had failed to prove the existence of a "pattern of racketeering activity". In noting the plaintiff's failure, ***Howell***, supra, held:

> ***"The Racketeer Influenced and Corrupt Organizations Act, [citation omitted], imposes civil liability on those who engage in certain "prohibited activities," defined as requiring proof of either "a pattern of racketeering activity"*** or "collection of an unlawful debt." [citation omitted]. "Racketeering activity" means any act indictable under various specified federal statutes, and certain federal offenses. [citation omitted]. ***The statute indicates only that a "pattern" "requires at least two acts of racketeering activity" within a ten year period.*** [citation omitted].

A civil RICO claim under [citation omitted] must involve a person who engages in a pattern of racketeering activity connected to the acquisition, establishment, conduct or control of an enterprise. [citations omitted]. ***The Supreme Court has rejected both the view that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes,*** see [citation omitted], ***and the equally extreme view that a pattern is established merely by proving two predicate acts,*** see, e.g., [citation omitted]. H.J. Inc., [citation omitted]. "While two acts are necessary, they may not be sufficient." [citation omitted].

> RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff . . . ***must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.***

[citation omitted]. The Supreme Court further explained this concept of "continuity" as either "a closed period of repeated conduct," or "past conduct that by its nature projects into the future with a threat of repetition." [citation omitted]. But, "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." [citation omitted]. The Court provided several examples of activity showing this continuity, all indicating activities that amount to or threaten long-term criminal activity. [citation omitted].

. . .

> ***There has been no indication of activities that amount to or threaten long term criminal activity.*** See [citation omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 190 and 193.

Thus, at this point in time, this Court has nothing more than the vague concept of "activities that amount to or threaten long term criminal activity" to utilize in determining whether plaintiffs proved that the requirement of "continuity" for the essential element of a "pattern of racketeering activity" existed in this case. The United States Court of Appeals for the Seventh Circuit in ***Sutherland v. O'Malley,*** 882 F.2d 1196 (7th Cir. 1989), described some of the factors it considered relevant to a determination of whether the racketeering activities alleged to exist in a particular case have the "continuity" required to constitute a "pattern of racketeering activity":

> "Ms. Sutherland cannot, however, establish that these predicate acts have the continuity required to constitute a pattern of racketeering activity. ***To satisfy the continuity element, the plaintiff must show that the alleged predicate acts "themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity."*** [citation omitted]. The plaintiff must prove "continuity of racketeering activity, or its threat, simpliciter." [citation omitted]. The Court has not formulated any general test for continuity in the abstract. ***Instead, the specific facts of each case must be examined to determine whether the predicate acts relied upon by the plaintiff establish a threat of continuing racketeering activity.*** [citation omitted].

Courts must examine a number of relevant factors when determining whether the predicate acts alleged are sufficiently continuous to constitute a pattern; *these factors include " 'the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.' " [citations omitted]* ("The quest for 'continuity plus relationship' necessarily involves a fact-specific analysis."); [citation omitted]. The Supreme Court in [citation omitted] also explained, however, that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement: *Congress was concerned in RICO with long-term criminal conduct.*" [citations omitted] ("Our cases demonstrate an expansive reading of civil RICO, *but only where a true 'pattern' of prohibited activity, not just sporadic or isolated instances of fraud, are shown.*"); [citation omitted] (*continuity requirement not satisfied where case "involves the type of 'isolated event' that fails to manifest the threat of continuing illegal activity indicative of a 'pattern' of racketeering activity*").

In light of these standards, we conclude that Mr. O'Malley's allegedly wrongful conduct does not satisfy the pattern requirement's continuity element. *While a RICO pattern can be established, in some circumstances, by proof of a single scheme, it is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.* See [citation omitted] ("*proof that a RICO defendant has been involved in multiple*

> ***criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity***")." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1204.

See also ***Phelps v. Wichita Eagle-Beacon,*** 886 F.2d 1262 (10th Cir. 1989); and, ***Menasco v. Wasserman,*** 886 F.2d 6891 (4th Cir. 1989).

In the case *sub judice,* plaintiffs have failed to prove anything more than related racketeering acts occurring at the rate of ***less than one per year.*** Parenthetically, plaintiffs were *only* able to show that defendant engaged in isolated and sporadic criminal acts related to the Westside bond offer. Consequently, plaintiffs were unable to establish the "continuity" requirement for a "pattern of racketeering activity", which requirement was described by the Supreme Court in ***H.J., Inc.,*** supra, as racketeering activities that "amount to or threaten long-term criminal activity." Plaintiffs' failure to prove "continuity" was memorialized by the Court of Appeals in ***Abell,*** supra, when it found that "plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's bond offer."

For these reasons, this Court should find that **18 U.S.C. §§ 1961, et. seq.,** does not reach the isolated and sporadic criminal acts shown by plaintiffs in this case, and it should dismiss plaintiffs' civil RICO claims asserted against defendant under those statutes.

(C). THE ATTORNEY'S FEES AWARDED TO PLAINTIFFS SHOULD BE SUBSTANTIALLY REDUCED OR ELIMINATED ALTOGETHER

Defendant contends that this Court should substantially reduce or eliminate altogether its award of attorney's fees to plaintiffs. Defendant's contention is based on the decision of the United States Court of Appeals for the Fifth Circuit in ***Abell,*** supra, wherein it held:

> "Nonetheless, we cannot simply affirm the district court's award, for that court awarded attorneys' fees against all of the defendants who stood trial. Thus, the court awarded attorneys' fees for all of the legal work necessary to develop and try plaintiffs' case. ***Plaintiffs developed much of their case, however, to obtain a verdict against WLJ. Several of plaintiffs' legal theories and arguments applied only to WLJ; indeed, at least one of their claims (for legal malpractice) implicates only WLJ.*** Consequently, ***the district court must readjust the attorneys' fees award to compensate plaintiffs only for the legal resources which they expended to develop a case against Fryar and All American.*** For this purpose, we will remand." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1142.

Thus, the Court of Appeals itself envisioned a substantial reduction in the attorney's fees this Court awarded to plaintiffs. As noted by the Court of Appeals, plaintiffs developed much of their case to obtain a verdict against defendant **Wright, Lindsey & Jennings,** and this Court awarded plaintiffs attorney's fees for that legal work. However, this Court's award of attorney's fees

must now be reduced to reflect only the legal resources expended by plaintiffs to develop their case against defendant. Of course, if this Court dismisses plaintiffs' civil RICO claims against defendant, it will be required to virtually eliminate the award of attorney's fees made to plaintiffs.

For these reasons, this Court should substantially reduce or eliminate altogether the attorney's fees awards made to plaintiffs.

(III). CONCLUSION

Defendant has shown that **18 U.S.C. §§ 1961, et. seq.,** is void-for-vagueness. This is so because **18 U.S.C. §§ 1961, et. seq.,** forbids "the doing of [acts] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Stated another way, **18 U.S.C. §§ 1961, et. seq.,** exacts "obedience to a rule or standard so vague and indefinite as really to be no standard to all." Alternatively, defendant has shown that plaintiffs failed to prove the "continuity" requirement necessary for the existence of a "pattern of racketeering activity." This is because plaintiffs were *only* able to show that defendant engaged in isolated and sporadic criminal acts related to the Westside bond offer. Finally, defendant has shown that this Court's award of attorney's fees to plaintiffs must be substantially reduced or eliminated altogether. Clearly, such a course of action is mandated by the specific findings of the United States Court of Appeals for the Fifth Circuit in *Abell,* supra.

FOR THE FOREGOING REASONS, this Court should dismiss the civil the civil [sic] RICO claims asserted against defendant Joe E. Fryar by the plaintiff-class of bondholders in Westside Rehabilitation Center.

FURTHER, this Court should substantially reduce or eliminate altogether the attorney's fees awarded to plaintiffs.

Respectfully submitted:

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By: /s/ Miles Edward Tilly
MILES EDWARD TILLY
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this memorandum in support of defendant's motion to dismiss civil RICO claims and in opposition to plaintiffs' motion for order upholding jury verdict, readjusting attorneys' fee award, and recalculating individual plaintiffs' damage award has this date been supplied to opposing counsel of

record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 7th day of May, 1990.

/s/ J. Minos Simon
J. MINOS SIMON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DOCKET NUMBER: 90-4737

EDWARD C. ABELL, JR., and
CAREY WALTON, ET AL
Plaintiffs-Appellees and
Cross-Appellants

VERSUS

POTOMAC INSURANCE COMPANY, ET AL
Defendants

Joe E. Fryar, Wright, Lindsey and Jennings, and
Valley Forge Insurance Company
Defendants-Appellants and
Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, HONORABLE JOHN M. SHAW, UNITED STATES DISTRICT JUDGE PRESIDING

PETITION OF JOE E. FRYAR, DEFENDANT-APPELLANT, FOR REHEARING

J. MINOS SIMON, LTD.
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By: J. MINOS SIMON

ATTORNEY FOR
DEFENDANT-
APPELLANT JOE E. FRYAR

TO THE HONORABLE, THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT:

Petitioner, Joe E. Fryar, defendant-appellant in the captioned cause, respectfully petitions the Court to grant a rehearing as to the decision of the Court of November 13, 1991, in support whereof petitioner respectfully gives the Court to understand the following:

1.

The November 13, 1991 decision works a violation of your petitioner's constitutional rights in that:

A. It denies to petitioner his due process rights under the Fifth Amendment to the United States Constitution, and

B. It denies to petitioner his right to trial by jury in violation of the Seventh Amendment to the United States Constitution.

A. IT DENIES TO PETITIONER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

On July 5, 1984 a class action was filed on behalf of the bondholders of Westside Habilitation, Inc. setting forth, among others, a claim against petitioner pursuant to the provisions of 18 U.S.C., § 1961, et seq., (a RICO civil claim).

Trial on the merits to a jury commenced on December 8, 1986 and concluded in February, 1987.

On October 30, 1985, which date subsumes all material time periods involved in the RICO civil claims against Joe E. Fryar, this Court decided the case of *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350. In that decision this Court expressly held that two (2) related acts of mail fraud constituted a "pattern of racketeering activity", without more, within the meaning of the RICO statute. Thus as of October 30, 1985, continuously through the trial date of the RICO civil claims filed against petitioner, the rule of law applicable to the RICO claims against petitioner was that a "pattern of racketeering activity" consisted of two (2) or more related predicate acts, without more. The RICO civil claims against petitioner were to be tested and actually were in fact tested according to the rule of law established by *R.A.G.S., supra.* On appeal from an adverse judgment concerning the RICO civil claims, petitioner challenged the correctness of the *R.A.G.S.* decision. But this Court affirmed *R.A.G.S. Abell v. Potomac Insurance Company,* 858 F.2d 1104 (5th Cir. 1988).

On June 26, 1989 the Supreme Court decided the case of *H.J., Inc., et al v. Northwestern Bell Telephone Company, et al,* 109 S.Ct. 2893. That decision expanded the meaning of "pattern of racketeering activity" far beyond the rule of law established by *R.A.G.S., supra. H.J.* established two (2) essential constituents of the pattern requirement of the RICO statute: (a) relationship or relatedness of two or more predicate acts and (b) continuity or threatening future criminal conduct.

The November 13, 1991 decision of this Court engaged the Court in utilizing the *H.J.* decision, which expanded the "pattern of racketeering activity" rule of

law far beyond the compass of *R.A.G.S.*, as a procrustean bed, upon which the perceived body of evidence developed during petitioner's trial was placed, and its limbs were extended, rather than chopped off, to make that body of evidence fit the procrustean bed. In short the newly expanded meaning of "pattern of racketeering activity" established in 1989 by *H.J.* was retroactively applied to conduct attributed to petitioner originating in 1976, some nine (9) years prior to the 1985 *R.A.G.S.* decision, thus creating a judicial ex post facto rule of law.

At all times material to the RICO civil claims against petitioner, your petitioner had no warning of the *H.J.* conduct which imposed civil and criminal liability upon him; he had no warning of what conduct to avoid or to defend against. He was not informed, for example, that "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement" (109 S.Ct. at p. 2902). Thus he was not given the opportunity or informed of the right to so tailor his conduct as to fall within the shelter of this defined "pattern of racketeering activity". Nor was petitioner informed that "though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves *include* a *specific threat of repetition* extending *indefinitely* into the future, and thus supply the requisite threat of continuity" (109 S.Ct. at p. 2902). Had he been informed of the multi-factors involved in the *H.J.* definition of "pattern of racketeering activity", then during his trial he would have had the opportunity to present evidence to rebut any incriminatory evidence and particularly the conclusion that "the racketeering acts themselves include a specific

threat of repetition extending indefinitely into the future". Moreover, generally speaking, had petitioner been placed on notice of the conduct proscribed by *H.J.*, he could have avoided the prohibited conduct, and during trial, he could have presented evidence in defense of the claims asserted against him and thus could have had the opportunity to exonerate himself completely from liability.

Petitioner's right to "fair warning" of the nature and character of the conduct proscribed "is fundamental to our concept of constitutional liberty. (citations omitted) As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment". *Marks v. United States*, 97 S.Ct. 990 (1977). See also *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964). Thus the November 13, 1991 decision of this Court complained of herein operates to deny to petitioner his due process rights in violation of the Fifth Amendment.

B. IT DENIES TO PETITIONER HIS RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Pertinent to this assignment of error is the following excerpt of this Court from its November 13, 1991 decision:

> "Along with these relatedness and continuity requirements, the Court introduced tests to establish their presence. See *Kehr Packages, Inc., v. Fidelcor, Inc.*, 926 F.2d 1406, 1412-13 (3rd Cir. 1991). For relatedness, the Court adopted a broad multi-factor test that turns on whether the

> alleged predicate acts 'are interrelated by distinguishing characteristics and are not isolated events.' *H.J.* 492 U.S. at 240, 109 S.Ct. at 2901 (quotation omitted). As for continuity, the Court noted that proof of multiple schemes is 'highly relevant' to the question of continuity but not a prerequisite[12], and defined continuity as 'referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.' *Id.* at 241, 109 S.Ct. at 2902. As was recognized by the Court, these tests are highly fact- and case- specific. See *id.* at 237, 242, 109 S.Ct. at 2899, 2902; *Kehr Packages,* 926 F.2d at 1412-13."

(page 748 of the opinion)

Paraphrasing this Court's foregoing statement, if indeed "these tests are highly fact- and case-specific", then, in petitioner's case, they are to be decided by the jury impaneled to try the case against your petitioner. The fact question of whether the predicate acts attributable to petitioner "are interrelated by distinguishing characteristics and are not isolated events" was never presented to the jury involved in the trial of petitioner's case. Thus none of the multiple factors involved in the issues of relatedness of the predicate acts and the continuity requirements of the RICO statute was ever presented to the jury called upon to try petitioner's case. Petitioner's case indeed was a suit at common law, and the value in controversy exceeded Twenty and No/100 ($20.00) Dollars. As to such a suit the Seventh Amendment provides:

---

[12] See *id.* 492 U.S. at 240, 109 S.Ct. at 2901.

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Overriding and essential fact questions involved in the RICO claims against your petitioner and relied upon by this Court for its November 13, 1991 decision were never presented to the jury impaneled to try petitioner's case. The jury in petitioner's case was never called upon to render a verdict as to the relatedness of the alleged predicate acts and as to the continuity factual characteristics of these alleged predicate acts. The November 13, 1991 decision complained of herein instances the act of this Court usurping the prerogative of the jury in determining these facts. In so doing this Honorable Court has denied to your Petitioner trial by jury in violation of the Seventh Amendment to the United States Constitution.

Thus, the November 13, 1991 decision works a violation of your petitioner's constitutional rights in that (a) it denies to petitioner his due process rights under the Fifth Amendment to the United States Constitution, and (b) it denies to petitioner his right to trial by jury in violation of the Seventh Amendment to the United States Constitution.

WHEREFORE petitioner respectfully prays that his petition for rehearing be granted and on rehearing that the November 13, 1991 decision be recalled and the decision of the district court be reversed as originally prayed

for by petitioner in his appeal from the district court decision.

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By: /s/ J. Minos Simon
J. MINOS SIMON
Bar Roll No. 12278

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing rehearing application has been forwarded to all counsel of record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 22nd day of November, 1991.

/s/ J.Minos Simon
J. MINOS SIMON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

EDWARD C. ABELL, JR., and
CAREY WALTON, ET AL

VERSUS

DOCKET NUMBER: 87-4260

POTOMAC INSURANCE COMPANY, ET AL

****

MOTION TO RECALL ORDER

COMES NOW, through undersigned counsel, defendant-appellant **Joe E. Fryar** (movant), who respectfully moves this Honorable Court to recall its order of September 12, 1989, remanding this cause to the district court, in support whereof movant gives this Court to understand the following:

OPERATIVE SALIENT FACTS

1. On February 19, 1987, the district court, in accordance with a jury's verdict, entered judgment in the amount of **Twelve Million Ninety-Six Thousand Eight Hundred Sixty-Six and 80/100 ($12,096,866.80) Dollars** in favor of plaintiffs-appellees **Edward C. Abell, Jr.,** and **Carey Walton, et al,** (respondents) and against movant and others in that certain civil action entitled ***"Edward C. Abell, Jr., et al v. Potomac Insurance Company of Illinois, et al"***, Docket Number 84-1786 "O", United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division.

2. The district court's judgment in favor of respondents and against movant was affirmed in part, reversed in part, and remanded by this Court in ***Abell, et al v. Potomac Insurance Company, et al,*** 858 F.2d 1104 (5th Cir. 1988), rehearing en banc denied 863 F.2d 882 (5th Cir. 1988), to the district court for a redetermination of the attorneys' fees and damages awards made against movant.

3. Subsequently, in ***Fryar v. Abell, et al,*** ___ U.S. ___, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989), a petition for writ of certiorari filed by movant was granted by the Supreme Court, summarily vacating that portion of this Court's judgment which had affirmed the district court's judgment holding movant liable to respondents on the civil RICO claims asserted against him. The Supreme Court's order vacating this Court's judgment specifically provided that **"the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *H.J. Inc. v. Northwestern Bell Telephone Company,* 492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)."**

4. On July 3, 1989, in ***Edward C. Abell, Jr., et al v. Wright, Lindsey & Jennings, et al,*** ___ U.S. ___, 109 S.Ct. 3242, ___ L.Ed.2d ___ (1989), the Supreme Court denied respondents' petition for writ of certiorari, imparting finality to this Court's judgment that had reversed the district court's nearly **Ten Million and No/100 ($10,000,000.00) Dollars** judgment against movant on respondents' securities law claims.

5. In ***Abell, et al v. Potomac Insurance Company, et al,*** 884 F.2d 196 (5th Cir. 1989), this Court entered an

order, remanding respondents' case against movant to the district court for further consideration in light of *H.J. Inc.*, supra. Additionally, this Court directed the district court to consider the appropriate disposition of this matter in light of movant's pending bankruptcy proceeding, i.e., ***"In Re Joe E. Fryar, Debtor"***, Docket Number 89-BK-80,595, United States Bankruptcy Court for the Western District of Louisiana, Alexandria Division.

6. On January 3, 1990, an order was entered by Hon. **Henley A. Hunter** in the aforementioned bankruptcy proceeding, lifting the automatic bankruptcy stay for the purpose of completing the litigation between movant and respondents. Thus, there is no longer any basis for any concerns this Court might have had regarding the automatic stay imposed by law upon the filing of movant's bankruptcy petition and the effect thereof on its ability to proceed to a determination of this matter.

7. In light of the foregoing, and for the additional reasons hereinafter recited, the remand of this case to the district court is without substantive legal basis and practical support. Additionally, this remand, if continued, will work to impose undue burden on the district court, which is already overextended by virtue of an existing vacant judgeship, and unnecessary and oppressive expense on the parties.

8. The Supreme Court's directive clearly contemplated that the legality of respondents' civil RICO claims against movant should be decided by this Court ***based on the record on appeal***. The resolution of that legal question by this Court will impart finality thereto, except as the

Supreme Court may decide to review such a decision on application for a writ of certiorari.

9. To have the district court, instead of this Court, decide the legality of respondents' civil RICO claims against movant but invites a circuity of judicial proceedings in that such a decision would be appealable to this Court. On appeal, this Court would be called upon to decide the very legal question which the Supreme Court has already directed it to determine. Consequently, this circuitous judicial misadventure would exact a heavy toll on the interests of judicial economy and efficiency and an oppressive financial burden on the parties.

10. For all these reasons, this Court's recall of its order of September 12, 1989, is in the interests of judicial efficiency and economy, as well as the parties' interests in attaining an expeditious and economical resolution of this controversy. This recall will allow this Court to reconsider this matter based on the record on appeal, resulting in substantial savings of judicial time to the district court and of litigation expenses to the parties.

WHEREFORE, MOVANT RESPECTFULLY PRAYS that this Court recall, vacate and set aside its order of September 12, 1989, remanding this case to the district court.

Respectfully submitted:

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By: /s/ J. Minos Simon
J. MINOS SIMON
Bar Roll No. 12278

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion to recall order has this date been supplied to opposing counsel of record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 22nd day of March, 1990.

/s/ J. Minos Simon
J. MINOS SIMON